

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

March 12, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 30, 2007

Case Number: TSO-0563

This Decision concerns the eligibility of XXXXXXXXXXXX (the Individual) to retain his access authorization.^{1/} The regulations governing the Individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual is eligible for access authorization. After reviewing the evidence before me, I find the Individual's access authorization should be restored.

I. Background

This administrative review proceeding began when a Department of Energy (DOE) Office, suspended the Individual's access authorization based upon derogatory information in the possession of the DOE Office that created substantial doubt pertaining to his continued eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the DOE Office subsequently issued a Notification Letter that included a statement of the derogatory information causing the security concern.

The security concern cited in the Letter involves the Individual's misuse of alcohol. The Notification Letter stated that the Individual has been diagnosed by a DOE consultant psychiatrist as suffering from alcohol dependence. The Notification Letter also indicated that on October 5, 2006, the Individual was arrested and charged with Assault Against a Household Member and Battery Against a Household Member and was intoxicated at the

^{1/} Access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5(a).

time he committed the offenses. The Letter also indicated that on July 28, 2006, the Individual was intoxicated while involved in a dispute with his wife that resulted in severely cutting his hand. The Notification Letter further outlined numerous other alcohol-related offenses. According to the Notification Letter, this constitutes derogatory information under 10 C.F.R. § 710.8(h) and (j) (hereinafter Criterion H and Criterion J).^{2/}

The DOE consultant psychiatrist evaluated the Individual on May 29, 2007. In her report, she diagnosed the Individual as suffering from alcohol dependence. The DOE consultant psychiatrist further indicated that the Individual reported that he had been abstinent from alcohol since October 5, 2006.

In her report, the DOE consultant psychiatrist indicated that in order to establish rehabilitation, the Individual should either produce documented evidence of attendance at Alcoholics Anonymous (AA) for a minimum of 100 hours with a sponsor, at least two times a week for a minimum of one year, or complete a minimum of 50 hours of a professionally led, alcohol abuse treatment program, for a minimum of six months, including aftercare. The DOE consultant psychiatrist recommended that the Individual be abstinent for a period of two years, including the time spent either at AA or in the treatment program. The DOE consultant psychiatrist indicated that adequate evidence of reformation would be either two years of absolute abstinence, if the Individual attends either AA or an treatment program as outlined above, or three years of absolute abstinence if the Individual does not attend one of those two programs.

The Notification Letter informed the Individual that he was entitled to a hearing before a Hearing Officer, in order to respond to the information contained in that letter. Upon receipt of the Notification Letter, the Individual requested a hearing, and that request was forwarded to the Office of Hearings and Appeals. I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.^{3/}

At the hearing, the Individual represented himself. The Individual testified on his own behalf, and presented the testimony of his previous counselor, the Employee Assistance Program psychologist, his father, his wife, his wife's friend, his AA sponsor and two fellow AA attendees. The DOE Counsel presented one witness, the DOE consultant psychiatrist. The DOE Counsel entered 42 exhibits into the record.

^{2/} Criterion H refers to information indicating that an individual has "an illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability." 10 C.F.R. § 710.8(h). Criterion J refers to information indicating that an individual has "[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse." *Id.* at § 710.8(j).

^{3/} 10 C.F.R. § 710.25(g).

II. The Hearing

At the hearing and in his response to the Notification Letter, the Individual admitted that the diagnosis of the DOE consultant psychiatrist that the Individual suffered from alcohol dependence was correct. Hearing Transcript (Tr.) at 7; DOE Ex. 2. Accordingly, the focus of the hearing was on the steps that the Individual has taken toward reformation and rehabilitation. The witnesses' testimony was directed toward those matters.

A. The Individual

The Individual testified that he has been abstinent since October 6, 2006. Tr. at 124. He sought counseling and joined AA because he injured his wife after consuming too much alcohol on October 5, 2006. Tr. at 52. Prior to that incident, he did not believe he would hurt his wife. After that incident, he was concerned he would lose his wife and family. Tr. at 52. The Individual stated that he enjoys being sober. Tr. at 108. He testified

I have changed my life successfully, and I'm proud of it. I'm happy being sober. I do not feel like I need it at all. I'm confident in places, like when I go to my in-laws and they have deck parties, it's not one of those things where I struggle, oh wow, there is liquor out there. I sat inside, watched my kids run around. I ended up taking care of other people's kids because they were falling down outside. But that's not what I want I do not want to be like that anymore. I enjoy my life now.

* * *

But some of the things I've done in Alcoholics Anonymous have really inspired me, given me a feeling that I haven't had elsewhere.

* * *

And it has changed my life. And either way I walk out of here, you know, I'm going to be happy, you know. I can tell you honestly, I'm the man you thought you hired, and better. . . . But as far as looking at my life now, I do not want to go back to where I was.

Tr. at 108-10. He continued that he has found a place he enjoys going in the AA meetings.

The Individual outlined the warning signs that he might possibly relapse as ceasing to go to meetings, not talking to his sponsor, and not communicating with his wife. Tr. at 113. He testified that if he saw those warning signs, he would contact his sponsor. If his

sponsor were not available, he has a list of people in AA that he could call.^{4/} Tr. at 116. He indicated that his wife and his parents are very supportive of his sobriety. Tr. at 116. In addition, he knows which co-workers are AA members, so he could contact one of them. Tr. at 116.

The Individual concluded his testimony by saying "I'm happy now. I'm choosing life. My kids have seen it. They've changed, you know, they're enthusiastic every day, wanting to do stuff, you know. My wife, our marriage continues to get better. So I'd rather have that than lead back down the path of, to me, certain death." Tr. at 124.

B. The Individual's Father

The Individual's father testified that he speaks with his son at least weekly. Tr. at 38. Following his son's arrest in October 2006 and continuing for about two months, the Individual and his father spoke every day. Tr. at 39. Although the Individual's parents live out of state, his father was in town on October 5, 2006, when the Individual "hit rock bottom." Tr. at 28. The Individual's father stated that he has not seen any alcohol in the Individual's house since October. Tr. at 31, 33. The Individual immediately stopped associating with friends who consumed alcoholic beverages, even though they lived next door. Tr. at 31. The Individual's house is neater. Tr. at 31-32. The Individual began working out. Tr. at 32. He is more attentive to his children. Tr. at 32. The Individual has been in situations where alcoholic beverages are available and offered to him, but he declined. Tr. at 33.

The Individual's father testified that there are three reasons why he believes the Individual is dedicated to his abstinence.

[O]ne, all through [his] life, when [he] get something in his head to do something, he does it. He sticks to it. He's never been one to cop out. He sticks to anything he really puts his mind to doing and he's determined to do. Two . . . he is very much dedicated to his family. His family is number one to him. And when I say his family, it's just not his immediate family, but his parents, too. He's very dedicated to us.

He is also – he likes to work. He's not one to stay home and do nothing. He's always been a really active child. He was not hyper, but active in doing

^{4/} I will note that when the Individual submitted his original witness list, he listed the names of 12 AA members that he would possibly call to testify. I believe this is also an indication that he could contact those members if he felt he was relapsing.

things. He's just – his whole demeanor is when he sets himself mind to something, he does it.

Tr. at 34. His father testified that he has picked up his son at AA meetings. Tr. at 34. The Individual interrupts his parents' visits to attend an AA meeting. Tr. at 34.

C. The Individual's Previous Counselor

The counselor testified that she first saw the Individual on October 17, 2006. Tr. at 15. She saw him weekly for the first nine weeks and then every other week until she retired in August 2007. Tr. at 16. She stated that he was committed to his sobriety. Tr. at 17. He did not deny his problem with alcohol. Tr. at 17. She testified that even when it was difficult for him to attend AA, he would go, which showed his commitment to his sobriety. Tr. at 19. She testified that when he saw her for counseling he was open and participatory. Tr. at 23.

D. The Individual's AA Sponsor

The Individual's AA sponsor testified that he has known the Individual for more than one year. Tr. at 71. He stated that the Individual is presently on the 12th step of the 12 step program. Tr. at 73. The sponsor testified that the Individual is "one of the few people who seems to have really taken hold of this thing enthusiastically, and he's adopted it as, you know, as a way to live and a way to have a better life." Tr. at 73-74. The sponsor intends to continue his relationship with the Individual, although he believes it is time for the Individual to sponsor someone. Tr. at 73-74. The sponsor stated that he believes the Individual has a low risk of consuming alcoholic beverages in the future, because the Individual is committed to the AA values and staying sober. Tr. at 76.

E. Two AA Members

The first AA member testified that he has known the Individual for over one year. Tr. at 55. He was at the Individual's initial AA meeting and he was at his one year anniversary meeting. Tr. at 55. He sees the Individual at an AA meeting at least once a week. Tr. at 55-56. The first AA member testified that the Individual is very dedicated to AA. Tr. at 56. The first AA member stated that the Individual "pretty much spilled his soul to the group, and it was honest and open." Tr. at 56. The Individual helps newcomers to the AA meetings. Tr. at 56. The first AA member believes the Individual will be a long-term member of AA because "he loves being there, you know. And . . . they say to go to meetings until you like them." Tr. at 58.

You know, to do the house cleaning is – it's painstaking to do it and do it right. And I think [the Individual] has done all that. And he's doing

everything he needs to do to keep his life in order. And he'll admit that his life is happier and everything is better.

Tr. at 58. The first AA member stated that the Individual's honesty affected him from the very beginning of the Individual's attendance at AA meetings. Tr. at 59.

The second AA member testified that he attends five to seven meetings a week. Tr. at 101. He continued that the Individual "might miss one AA meeting a week, but not very often." Tr. at 101. He believes the Individual has been attending meetings for about a year. Tr. at 102. The second AA member believes the Individual is very committed to AA. Tr. at 102. The Individual is an active participant in AA. Tr. at 102. He testified that the Individual shares at every meeting and that he speaks from his heart. Tr. at 103. The second AA member testified that he goes on "12-step calls," which he stated were helping somebody who is intoxicated to try to get the person to a hospital room, an emergency room, or to a treatment facility. Tr. at 101-02. He stated that not everyone in AA makes 12-step calls and that the Individual is the second person that he will call to accompany him. Tr. at 104-05. The first person on his list is his own sponsor. Tr. at 105.

F. The Individual's Wife

The Individual's wife has known him for nine and a half years and has been married to him for four and a half years. Tr. at 81. She testified that immediately after the incident in October 2006, the Individual stopped consuming alcohol and began counseling and attending AA. Tr. at 83. She did not give him any ultimatums; he decided on his own to attend AA. Tr. at 83. She has not seen her husband consume alcohol since October 2006, although he has been in situations where alcohol is available. Tr. at 84. She stopped consuming alcohol because he asked her to. Tr. at 84. They do not have any alcohol in their house. Tr. at 89. She believes he changed to keep their family together and to better their relationship as husband and wife. Tr. at 84. The Individual's wife testified that the Individual attends AA four or five days a week. Tr. at 85. She stated that since the Individual stopped consuming alcohol they communicate better. Tr. at 87.

G. The Wife's Friend

The wife's friend testified that she met the Individual through his wife and has known him about four years. Tr. at 93. Presently, she and her husband socialize with the Individual and his wife occasionally. Tr. at 94. The wife's friend sees the Individual's wife every week. Tr. at 94. She testified that she has not seen the Individual consume alcohol since October 2006, although she has been with him when alcoholic beverages were available. Tr. at 95. It did not seem difficult for him to refuse the alcoholic beverage. Tr. at 95. She testified about the change in the Individual since October 2006.

You know, I thought a lot about this, and I just – he’s just changed so much. I cannot even put into words how he’s changed so much. But just seeing him with his family, and it’s a look in his eyes. You can see the clarity that is there, that wasn’t there when he was having these problems. It’s a different kind of clarity that he has now that he didn’t have before. And he is just so good with his kids. An he’s good with my family. And I just feel – I just feel it. It’s a personal feeling to me. And when you look at him you can just tell that he’s clean and sober, and you can tell he wants to stay that way.

Tr. at 95-96. In discussions with the Individual’s wife, the wife’s friend knows that the Individual goes to a lot of AA meetings. Tr. at 96. The wife’s friend testified that she and her husband had stopped socializing with the Individual and his wife prior to October 2006, because they did not believe it was safe to spend time with them. Tr. at 98. She testified that when the Individual was drinking, his wife would call her and complain about his consuming alcohol and be upset. Tr. at 98. Now, the Individual’s wife is “really, really happy. It’s the happiest I’ve ever seen [the Individual’s wife].” Tr. at 99.

H. The DOE Employee Assistant Program Psychologist

The DOE Employee Assistant Program (EAP) psychologist testified that he first met with the Individual on October 6, 2006. Tr. at 63. The Individual asked for guidance about relationship difficulties and his alcohol problems. Tr. at 63. EAP began a fitness-for-duty evaluation formally on October 16, 2006, which is ongoing. Tr. at 63. The EAP psychologist saw the Individual monthly from October 2006 until April 2007; now he sees him every other month. Tr. at 63. The EAP psychologist opined that the Individual probability of relapse is low. Tr. at 65. He also opined that there is adequate evidence of reformation and rehabilitation. “He has now over twelve months of sobriety. We were at the point in Occupational Medicine that we were lifting restrictions and recommending that he be returned to the Human Reliability Program. So I’m comfortable with his recovery.” Tr. at 66. The EAP psychologist testified that in his opinion, the Individual is in the top ten percent of individuals who see him in terms of his commitment to sobriety. Tr. at 66. As part of the fitness-for-duty evaluation, the Individual has regular unannounced breath alcohol testing, the EAP psychologist indicated that all the Individual’s tests have been negative. Tr. at 67. He stated that Occupational Medicine is nearly ready to close the fitness-for-duty evaluation. Tr. at 67. The EAP psychologist stated that AA is sufficient support for the Individual, because he is very committed to the AA program. Tr. at 69.

I. The DOE Consultant Psychiatrist

The DOE consultant psychiatrist testified that she found the Individual very straightforward during their interview. Tr. at 126. She stated that she told the Individual

at the interview that he was doing everything good for his recovery, but that he just did not have enough time to mitigate the concern. Tr. at 126. She was concerned that, at the time of the interview, the Individual had been sober for seven months but still was depressed. Tr. at 126. The most critical element for the DOE consultant psychiatrist at the hearing was the Individual's self-awareness of what his early signs of relapse would be. Tr. at 127. The DOE consultant psychiatrist testified that the Individual's risk of ever consuming alcohol again in the immediate foreseeable future is significantly low. Tr. at 128. She concluded "[s]o I think at this point in time he is definitely adequately rehabilitated. [And] the lack of time in my initial recommendation for reformation, the two years, I think was adequately mitigated by the kind of rehabilitation he had achieved at this point." Tr. at 129.

III. Standard of Review

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of proceeding, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the Individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See *Dep't of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of the national security test" for the granting of security clearances indicates that "security-clearance determinations should err, if they must, on the side of denials.") *Dorfman v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issue. *Personnel Security Hearing* (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate, or mitigate the allegations. *Personnel Security Hearings* (Case No. VSO-0005), 24 DOE ¶ 82,753 (1995), *aff'd*, 25 DOE ¶ 83,013 (1995). See 10 C.F.R. § 710.7(c).

IV. Findings and Conclusions

As noted above, the Individual in this case does not dispute the diagnosis of alcohol dependence and understands that it raises a DOE security concern under Criterion J and

Criterion H. The issue is whether the Individual has demonstrated that he is reformed and/or rehabilitated from alcohol dependence. Therefore at the hearing, we addressed the Individual's rehabilitation and/or reformation.

A. Criterion J

I am convinced that the Individual has been abstinent since October 6, 2006. He testified to that effect and his witnesses corroborated his testimony. The Individual's wife testified that he has not consumed alcohol since October 6, 2006. His father testified that he has not seen the Individual consume alcohol since October 6, 2006. The wife's friend said she has been in situations with the Individual where alcohol has been served and he did not consume any alcoholic beverages. The Individual's counselor is confident that he has been abstinent since October 6, 2006. The EAP psychologist indicated that the Individual has passed all the unannounced breath alcohol tests conducted under his fitness-for-duty evaluation, and he believes the Individual has been abstinent.

The Individual has shown his commitment to the AA program. First, his father testified that he will interrupt visits by his parents to attend AA meetings. The Individual's wife testified that he attends AA meetings regularly, at least four to five times a week. The wife's friend testified that she told her the Individual has been attending AA meetings. Also, the Individual's sponsor and two AA members testified that they see the Individual at AA meetings. Secondly, the Individual has shown that he contributes to the AA program. The Individual's AA sponsor testified that the Individual contributes to the program by honestly sharing his feelings both during meetings and to the sponsor when they meet. The other two AA members testified that the Individual is open and honest during the AA meetings; in addition, the Individual collects and counts the monies collected during the meetings and greets new attendees. The second AA member testified that the Individual is the second person he calls when he needs to go on a 12-step call. The Individual's counselor testified that the Individual was committed to the AA program. He attended meetings daily when he first started seeing his counselor, and he was working with a sponsor. The EAP psychologist testified that he was impressed with the Individual's commitment to the AA program. The Individual has shown the EAP psychologist that he is working the 12 steps with his sponsor. In addition, the EAP psychologist testified that the Individual's spirituality has increased with his commitment to AA. Finally, the DOE consultant psychiatrist opined that the Individual is committed to AA and his sobriety.

I am also convinced that the prognosis for the Individual is good and that the risk of his consuming alcohol again is low. It is true that the Individual has not been abstinent for two years, the period originally recommended by the DOE consultant psychiatrist. However, in spite of the Individual's shorter abstinence period, the DOE consultant psychiatrist testified that she believes he is adequately rehabilitated. Further, she testified that the type

of rehabilitation the Individual achieved at the time of the hearing obviates her initial two-year recommendation for reformation. She opined that the Individual's risk of consuming alcohol again in the future is low. The EAP psychologist stated that the Individual's risk of consuming alcohol again is low and that there is adequate evidence of reformation and rehabilitation. Therefore, based upon all the evidence the Individual brought forth at the hearing and the opinion of the two experts in this case, I find that the Individual has shown that he is rehabilitated. Consequently, I find that the concern raised under Criterion J by the DOE consultant psychiatrist's diagnosis of alcohol dependence has been mitigated by the evidence provided by the Individual.

B. Criterion H

The concern raised under Criterion H also relates to the diagnosis by the DOE consultant psychiatrist that the Individual was alcohol dependent, resulting in a mental condition which causes or may cause a significant defect in judgment or reliability. Because the Criterion H concern is supported by the same facts as the Criterion J concern, and the Individual has shown that he is rehabilitated and reformed, I find that the concern raised under Criterion H by the DOE consultant psychiatrist's finding that the Individual had a mental condition which causes or may cause a significant defect in judgment or reliability has been mitigated by the evidence submitted by the Individual.

V. *Conclusion*

As the foregoing indicates, I have found that there was sufficient derogatory information in the possession of the DOE that raised a security concern under Criteria H and J. After considering all the relevant information, I find that the Individual has resolved the Criteria H and J security concerns cited in the Notification Letter. Therefore, I conclude that restoring the Individual's access authorization will not endanger the common defense and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Consequently, it is my decision that the Individual's access authorization should be restored. The parties may seek review of this decision by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: March 12, 2008